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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, etc., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, et al., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW and
DR. DOMINGO C. SORONGON, *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

BRIEF OF THE CENTER FOR CORRECTIONAL JUSTICE, AMICUS CURIAE

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BRIEF OF THE CENTER FOR CORRECTIONAL JUSTICE, AMICUS CURIAE

INTEREST OF AMICUS *

The Center for Correctional Justice (hereinafter referred to as the Center) is a non-profit corporation funded by private foundation and federal grants. The Center was established in 1971 by a group of lawyers, correctional officials and ex-offenders to promote peaceful, non-judicial methods of resolving grievances in correctional institutions. Since its inception, a substantial increase in the number of functioning administrative grievance mechanisms has provided the Center with opportunities for extensive study and direct involvement in the design and implementation of correctional grievance procedures.

Throughout the past five years the Center has worked closely with a wide variety of organizations to further the development of effective grievance mechanisms in correctional institutions, including the American Arbitration Association, The American Bar Association's Commission on Correctional Facilities and Services, the American Correctional Association, the National Association of Attorneys General and the National Council on Crime and Delinquency. In addition, the Center has provided direct technical assistance in the evaluation, design and implementation of inmate grievance mechanisms to correctional administrators in California, Colorado, Delaware, Georgia, Kansas, Massachusetts, New Jersey, New York, Ohio, and South Carolina. The Center also has given assistance in the drafting of legislation for the enactment of correctional grievance mechanisms in California, Massachusetts, Nebraska, New York and Texas.

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* Letters of consent from counsel for petitioners and counsel for respondents have been filed with the Clerk of the Court.

In a study conducted in 1974 for the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association, the Center assessed the comparative impact of mechanisms for the handling of grievances in institutions for juveniles. To gather initial data, the Center surveyed over 900 federal, state and private institutions and agencies throughout the country. Based on responses to the survey, Center staff identified and visited 16 institutions in eight states with the most innovative mechansms. This study gave the Center an opportunity to evaluate and compare different types of mechanisms. See J. Keating, K. Gilligan, V. McArthur, M. Lewis and L. Singer, *Seen But Not Heard: A Survey of Grievance Mechanisms in Juvenile Correctional Institutions* (1974) [hereinafter cited as Keating, *Seen*].

In a subsequent study conducted for the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration (LEAA), the Center visited correctional institutions for adults in 14 states and the Federal Bureau of Prisons to examine the operations of various types of grievance mechanisms including formal procedures, ombudsmen and inmate councils. At each site, records of the mechanism were examined and evaluated; staff and inmates were interviewed; and a questionnaire was administered to a ten percent randomly selected sample of the inmate population. These techniques were designed to elicit, among other things, staff and inmate knowledge of the grievance procedure, inmate willingness to use it, assessment of its effectiveness, ideas for its improvement, analysis of its strengths and weaknesses, and guidance for its introduction elsewhere. The research for this study gave the Center an addi-

tional opportunity to assess and compare the effectiveness of existing administrative means of handling inmates' grievances. J. Keating, V. McArthur, M. Lewis, K. Sebelius and L. Singer, *Toward a Greater Measure of Justice: Grievance Mechanisms in Correctional Institutions* (1975) [hereinafter cited as Keating, *Toward*].

In addition to its research efforts, the Center provided design and implementation assistance to the California Youth Authority which, in 1974, introduced an innovative grievance procedure for inmates under its supervision. LEAA recently has designated this mechanism as one of its "Exemplary Projects" for the current fiscal year. The Center is presently involved in an LEAA and Ford Foundation-sponsored project to replicate the California Youth Authority mechanism in four different locations and/or correctional environments, including Colorado, New York and South Carolina adult corrections and California parole.

Because of its deep involvement in the development of administrative grievance mechanisms for correctional institutions, the Center is concerned about the impact of the imposition of a requirement for the exhaustion of administrative remedies prior to the filing of prisoners' § 1983 suits. Any reexamination of the rule articulated in *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), should include consideration of current progress in the development of correctional grievance mechanisms. The Center has prepared this brief to provide the Court with whatever information and insights resulting from its research and experience may be helpful in its consideration of the exhaustion requirement within the context of this case.

THE QUESTION PRESENTED

Whether state prisoners who claim deprivation of civil rights arising from conditions of incarceration must exhaust state administrative remedies prior to bringing suit under the 1871 Civil Rights Act, 42 U.S.C. § 1983.

SUMMARY OF ARGUMENT

In the view of *amicus,* the imposition of an exhaustion requirement at this time would endanger one of the most innovative and positive developments in corrections in recent times. Correctional administrators are experimenting presently with a wide variety of models for the administrative remedy of prisoners' grievances. Some of the remedies developed to date represent an advance not only for corrections, but also for the broader field of administrative law. The imposition of an exhaustion requirement could well curtail further experimentation by endorsing what is likely to become the lowest common denominator among correctional grievance mechanisms.

Should a requirement to exhaust administrative remedies be imposed, the Center respectfully requests the Court to articulate specific standards for adequacy and timeliness. The suggested standards, derived from the Center's research and experience in designing and implementing procedures, include, as a minimum, written responses with reasons, tight time limits, hearings and some form of independent outside review. Other standards suggested by the Center as critical to the creation of fair and effective administrative remedies include the participation of prisoners and line staff in the operation of the mechanisms, protection from re-

prisal, some form of representation and an impartial method for settling jurisdictional disputes.

The Center's research indicates that mechanisms which do not meet these standards are unlikely to respond fairly and effectively to the wide range of prisoners' grievances. Amicus further submits that ineffective mechanisms will delay, rather than reduce, recourse to the courts.

The Maryland Inmate Grievance Commission fails to measure up to the standards identified by the Center as essential. Because of these failings, it would be inappropriate to require respondents in this case to exhaust the available administrative remedy before seeking relief in federal court under 42 U.S.C. § 1983.

ARGUMENT

I. THE IMPOSITION OF A REQUIREMENT THAT PRISONERS EXHAUST ADMINISTRATIVE REMEDIES BEFORE BEING GRANTED ACCESS TO THE FEDERAL COURTS WOULD BE PREMATURE.

When the Center conducted a recent survey to assess development of correctional grievance mechanisms, it found that a substantial majority of existing grievance mechanisms had been established since 1971. McArthur, "Inmate Grievance Mechanisms: A Survey of 209 American Prisons," *Federal Probation,* December 1974, p. 41. Of those mechanisms possessing more permanent characteristics, such as a written rule or regulation describing the procedure, records, or a requirement for responses, the overwhelming majority had been created within the past three to four years.

The history of New York State's recent attempts to create effective, responsive grievance mechanisms in its correctional system is illustrative. The New York

Division for Youth created an ombudsman program for its institutions in August, 1972. See Silbert and Sussman, *The Rights of Juveniles Confined in Training Schools and the Experience of a Training School Ombudsman,* 40 Brooklyn L. Rev. 605 (1974). In 1972 the New York State Department of Correctional Services established an internal "Inspector General." State of New York Department of Correctional Services, *Administrative Bulletin #59,* May 22, 1972. Also in 1972, the Commission of Correction was reorganized to oversee state correctional institutions and prevent abuse of inmates; that Commission was reconstituted and given broader powers in 1975. N.Y. Correction Law § 46. Finally, in 1975, legislation mandating the establishment of a grievance mechanism that included inmate participation and outside review of grievances in state correctional institutions was passed and signed into law by the Governor. N.Y. Correction Law § 139. The last statute went into effect on February 5, 1976. The State of New York obviously is still searching for the most effective way to handle the grievances of inmates.

New York's experience testifies to the readiness of correctional administrators to attempt to create administrative grievance mechanisms. An exhaustion requirement is not necessary to encourage administrators to act, since they already are doing so in great numbers. In fact, the reasons for experimentation advanced by administrators have little to do with avoiding litigation. The Center's survey of grievance mechanisms in adult institutions indicated that the reasons for instituting such mechanisms given by the wardens of the 209 institutions responding had little to do with considerations related to an exhaustion requirement:

> The most common reasons in order of frequency, were 'to provide all inmates opportunities to voice grievances and receive an official response' (143 respondents), 'to assist management by identifying institutional problems' (136), 'to reduce inmate frustration' (132), and 'to aid in rehabilitation of inmates' (126). Reduction of violence and litigation were given far less often—only 60 to 50 times, respectively. McArthur, *supra,* at 44.

While the amount of experimentation with administrative procedures in corrections is considerable, the variety of experimentation is even more impressive. Iowa has a correctional ombudsman created by and answerable to the legislature, I.C.A. § 601G; Minnesota has a correctional ombudsman created by the legislature and answerable to the Governor, Minn. Stat. 1973 Supp. §§ 241.407-241.45; Ohio had (and on the basis of two years' experience now has done away with) an ombudsman answerable only to the corrections department, Department of Corrections Administrative Regulation 847; the Bureau of Prisons has an internal, multi-level procedure, Federal Bureau of Prisons Policy Statement 2001.6A, *Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities,* October 18, 1974; Wisconsin has a multi-level procedure that involves an assistant to the State Attorney General as a final level of review, Division of Corrections, Department of Health and Social Services Regulation, *Inmate Complaint Review System,* November, 1972, rev'd January, 1973; the California Youth Authority has a multi-level procedure that submits grievances to volunteer professional arbitrators from the general community, California Youth Authority, *Principles, Ward Grievance Procedures,* September 22, 1975; New York now has a multi-level procedure that refers complaints to a Commission of Correction, which, in turn, may delegate its review to arbitrators from the general community, N.Y. Correction Law § 139; the State of Washington had (and has now discontinued) an elaborate and much publicized scheme of inmate self-government that included a procedure for handling both individual and group complaints; South Carolina has an internal ombudsman, a highly developed institutional and departmental inmate council system and is preparing to introduce an experimental multi-level procedure with arbitration.

The seeming confusion of approaches is simply an indication of the complexity of the task. In a rare burst of innovation and experimentation, correctional administrators are searching for answers to a difficult problem. This is not the time to stifle that search by imposing a requirement for exhaustion that well may have the effect of endorsing the lowest common denominator and, thereby, ending further efforts to create truly effective mechanisms.

Another reason for avoiding judicial action that might hamper or retard the development of grievance mechanisms is the place that experimentation in corrections is beginning to take in the whole developing field of administrative law. Current testing of the ombudsman concept in corrections is providing unique information about the application and limits of this form of administrative remedy; experiments with the application of mediation and arbitration in correctional grievance mechanisms well may point the way to future developments in other contexts. See, *e.g.,* L. Singer and L. Nader, *Dispute Resolution in the Future: What are the Choices?* (prepared for the California State Bar Association 1975).

If the Court imposes a requirement for exhaustion at this time, it may discourage experimentation and establish untested standards that are questionably related to the development of inmate grievance mechanisms which are fair and effective.

II. IF AN EXHAUSTION REQUIREMENT IS TO BE IMPOSED, THIS COURT SHOULD SET FORTH MINIMUM STANDARDS OF FAIRNESS, ADEQUACY AND TIMELINESS.

If the Court imposes a requirement for the exhaustion of state administrative remedies in this case, it should do so only while establishing standards for adequacy and timeliness that ensure, within the unique correctional context, the development of procedures that are both fair and effective.

The unique aspects of the prison environment are well known to the Court; they formed a substantial consideration in the Court's earlier consideration of an exhaustion requirement in *Preiser, supra:*

> For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State. . . . What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. 411 U.S. at 492.

The total nature of the prison system means inevitably that the grievances of inmates will include a broad range of matters varying in importance from fundamental questions of constitutional significance to objectively petty issues that are perceived as important only by the grievants. This amalgam of grievances has been well represented in prison litigation in

the federal courts. Compare, for example, *Jackson* v. *Bishop,* 404 F.2d 571 (8th Cir. 1968) (inmate's *pro se* § 1983 action challenging corporal punishment administered in Arkansas state penitentiaries as a violation of the Eighth Amendment) with *Sparks* v. *Fuller,* 506 F.2d 1238 (1st Cir. 1974) (inmate's § 1983 action to prevent the eviction of three unauthorized pet cats).

Another inherent aspect of the correctional environment is the powerlessness of an inmate vis-à-vis the prison administration. In contrast to an employee who may be required to exhaust a contractual grievance mechanism and who proceeds through all levels of the grievance procedure with the union's support, bargaining power and financial resources, an inmate stands alone and isolated. The inmate, moreover, frequently must seek relief through a procedure entirely in the hands of staff and administrators, whose policies and actions generally are the source of complaint. The Court noted some results of this condition in *Wolff* v. *McDonnell,* 418 U.S. 539, 562 (1974):

> [I]nmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace.

Considering these two aspects of prison life—its all-encompassing nature and the powerlessness of inmates—an effective grievance mechanism for corrections must take extraordinary measures not only to be fair objectively, but also to be perceived as fair by inmates. A mechanism that does not meet this standard of fairness is not likely to be effective. As the National Advisory Commission on Criminal Justice Standards and Goals observed in its volume on *Corrections* at 57 (1973):

> A formal procedure to ensure that offenders' grievances are fairly resolved should alleviate much of the existing tension within institutions . . . Peaceful avenues for redress of grievances are a prerequisite if violent means are to be avoided. Thus all correctional agencies have not only a responsibility but an institutional interest in maintaining procedures that are, and appear to offenders to be, designed to resolve their complaints fairly.

Through research conducted over the past three years in correctional institutions for adults and juveniles throughout the country, the Center for Correctional Justice has identified certain standards that it believes are essential to the creation of grievance procedures which are both fair and effective. These standards include:

(1) *Written responses with reasons.* Every complaint submitted through a grievance procedure should receive a response in writing. If the complaint is denied, the response should include reasons for denial. Without this requirement, it is impossible for grievants or other interested parties to a complaint to know the grounds on which the decision was based. The reason for such a standard, especially within the correctional context, has been well articulated by this Court in *Wolff* v. *McDonnell, supra:*

> . . . [T]he provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. 418 U.S. at 565.

Most existing correctional grievance mechanisms recognize the importance of this element and provide for

written responses, with reasons, to all grievances. See, *e.g.,* Federal Bureau of Prisons Policy Statement 2001.6A, *Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities,* October 18, 1974; and California Youth Authority, *Principles, Ward Grievance Procedures,* September 22, 1975.

(2) *Time Limits.* Brief, enforceable time limits are essential at every level of an inmate grievance procedure. The National Advisory Commission on Criminal Justice Standards and Goals has expressed in concrete terms what it considers an acceptable, reasonable standard for timeliness:

> Where complaints are filed against conditions of correctional control or against the administrative actions or treatment by correctional or other government authorities, offenders may be required first to seek recourse under established administrative procedures and appeals and to exhaust their administrative remedies. Administrative remedies should be operative within 30 days and not in a way that would unduly delay or hamper their use by aggrieved offenders. *Corrections* 23 (1973).

The Center's research has corroborated the judgment of the National Advisory Commission. In its survey of innovative grievance mechanisms in correctional institutions for adults, the Center found that the ability of a mechanism to provide "fast answers" was a key characteristic in determining whether inmates used and trusted available mechanisms. See Keating, *Toward,* at 31.

Examples of grievance procedures that embody enforceable time limits at each step include the Federal

Bureau of Prisons Administrative Remedy Procedure, *supra* (failure to respond construed as denial of grievance with right to appeal to the next step); and the California Youth Authority Ward Grievance Procedure, *supra* (lack of a response within prescribed time period entitles grievant to proceed to next level of review).

The need for what may appear, at first glance, to be unseemly haste arises from the peculiar nature of correctional institutions. A correctional grievance procedure must respond to complaints about the application of minor housing unit rules and customs, as well as those involving constitutional issues. While a procedure requiring five or six months may seem reasonable for the latter type of case (although some of these, too, will require more timely action), it would be "untimely" for the less substantial matters that constitute the bulk of grievances submitted by aggrieved inmates, such as complaints about inadequate nutrition or medical care.

Procedures also should have special provisions for emergency grievances. The Bureau of Prisons procedure, *supra,* establishes a 48-hour limitation on the reply to a "complaint . . . of an emergency nature [that] threatens the inmate's immediate health or welfare"; the California Youth Authority, *supra,* provides for prompt review by the appropriate official "where there is a critical time factor and action must be taken before a regular grievance hearing and appeal can be held."

(3) *Outside Review.* Another critical standard for the creation of grievance mechanisms that are fair (and adequate from the perspective of prisoners) is

the review of grievances by some person or agency independent of the correctional agency. The need for impartial review within the framework of an administrative remedy is not unique to corrections, nor does the requirement for outside review necessarily impugn the motives of correctional administrators. See *Morrissey* v. *Brewer,* 408 U.S. 471, 486 (1972); *Goldberg* v. *Kelley,* 397 U.S. 254, 269 (1970). The requirement simply reflects the reality of prison life, where the quality of power exercised by administrators and staff over prisoners is so absolute that any administrative procedure created to handle inmates' grievances necessarily must be surrounded with safeguards.

It is not sufficient simply to provide for review by extra-institutional personnel who are hired by and responsible to the department, for many grievances will involve the substance or application of *departmental* policies and regulations. This fact has led observers of correctional grievance mechanisms to stress consistently the need for some sort of independent administrative review of prisoners' grievances. See, *e.g.*, S. Krantz, R. Bell, J. Brant, M. Magruder of the Center for Criminal Justice, Boston University School of Law, *Model Rules and Regulations on Prisoner Rights and Responsibilities* 203 (1973). See also, the Academy for Contemporary Problems, the Group for the Advancement of Corrections, *Toward a New Corrections Policy: Two Declarations of Principles* 10 (1974); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 57 (1973); National Association of Attorneys General, Committee on the Office of Attorney General, *Special Report: Prison Grievance Procedures* 14 (1973); National Council on Crime and Delinquency, *Model Act on Rights of Pris-*

oners 18 (1972); T. Fitzharris, *A Report to the Assembly Interim Committee on Criminal Procedure: The Desirability of a Correctional Ombudsman* 44 (1971).

Recognition of the need is more than theoretical. Mechanisms in at least nine states (California, Connecticut, Illinois, Iowa, Maryland, Minnesota, New York, North Carolina, and Wisconsin) already provide for the review of grievances by individuals or groups independent of the correctional system, while like mechanisms are being introduced in Colorado, South Carolina and California youth parole.

The Center recognizes that it is not necessary for the opinion of the independent body to be binding on the corrections department for the system to be effective. In California and New York, for example, the head of the corrections system may reject the recommendation of the outside arbitrator; and conclusions of the ombudsman traditionally have been advisory. It is the independence and fairness of the outside reviewing body and the good will of the administrators of the correctional system, rather than the threat of binding sanctions, that make procedures effective.

(4) *Hearings.* The importance of a hearing as an integral component of an "adequate" administrative remedy has long been recognized. See, e.g., *Goss* v. *Lopez,* 419 U.S. 565 (1975); *Goldberg* v. *Kelly, supra; Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306 (1950).

The requirement is no less applicable to corrections, where such a hearing, in addition to meeting mandated standards of procedural adequacy, may also serve to promote a climate of justice and fairness. D. Fogel, *"We Are the Living Proof": The Justice Model for Corrections* 204 ff, (1975).

Virtually all existing correctional grievance mechanisms provide some form of hearing at one or more levels of the procedure, ranging from a formal arbitration hearing in the California Youth Authority procedure, *supra* at 6-15, to a simple interview with an ombudsman/investigator in Minnesota, see Minn. Stat. 1973 Supp. § 241.44, and Connecticut, see *Agreement Between the Connecticut Department of Correction and the Hartford Institute of Criminal and Social Justice,* September 12, 1973.

The Center's research, corroborated by its operational experience, points to another element closely related to the requirement for a hearing, that well may be essential to the creation of a credible and effective grievance mechanism, *i.e., participation by inmates and line staff in the operations of a procedure.* Such participation serves not only to enhance the credibility of a mechanism but also ensures that most people in an institution will be aware of the existence and mechanics of a procedure. Inmate and staff participation has the further advantage of enabling those people who must live with a particular solution to share a role in developing it.

In practice, a number of jurisdictions have included this element in their mechanisms. The California Youth Authority, *supra,* requires all institutions under its jurisdiction to grant inmates and staff meaningful participation in resolving grievances; most have done so by creating grievance committees with equal numbers of elected inmates and staff as the first level at

which grievances are decided. The New York Correction Law, § 139.1 requires grievance resolution committees "to be established in each institution, consisting of five persons, four of whom shall be entitled to vote, two of whom shall be inmates of such correctional institution, and a non-voting chairman." In Wisconsin, wardens have discretion to refer complaints to a complaint advisory board consisting of two staff members and two inmates. Division of Corrections, Department of Health and Social Services, Regulation, *supra.*

The Center's comparative analysis of grievance mechanisms indicates strongly that such participation, either as a contact point with the procedure (*e.g.,* through the use of inmate grievance clerks) or as a level of review, may be crucial in determining the readiness of inmates to use a grievance procedure. For example, in the California Youth Authority, where participation is an integral feature of the procedure, two-thirds of the inmates surveyed indicated that they would use the available grievance mechanism if they had a serious complaint about an institutional policy or unfair treatment by a staff member. The responses to the same questions of inmates surveyed in the Atlanta Penitentiary of the Federal Bureau of Prisons, where there is no element of participation in the available mechanism, indicated that very few (less than five percent) would use the Bureau of Prisons procedure to complain about institutional policy or unfair staff treatment. See Keating, *Toward*, at 28.

While research on the element of participation is not yet conclusive, it does seem to indicate that such participation well may be an important part of the

effort to create fair, effective and, hence, adequate administrative grievance procedures in corrections.

Other design principles, while important, are less central than those discussed above. These include protection of grievants and witnesses from reprisals and representation of grievants by other inmates, prison staff, or outsiders. There should also be some objective method of determining whether a specific grievance comes within the jurisdiction of the procedure. To date most mechanisms have defined grievances broadly, thereby including the entire gamut of inmate problems. Whatever the scope of the procedure enacted, there must be a means to challenge the exclusion of particular complaints. The settling of jurisdictional disputes (for example, distinguishing disciplinary matters from grievances) should not be left to the unreviewable discretion of administrators.

These, then are some of the standards that the Court should consider, if it decides to impose a requirement for exhaustion of state administrative remedies on prisoners who wish to file § 1983 suits. Certainly, written responses with reasons, tight time limits, outside review and hearings are indispensable standards; participation well may be critical; and protection from reprisal, some form of representation and an objective method for determining jurisdictional disputes are extremely important.

An additional consideration remains: one principal reason for establishing an exhaustion requirement is the desire to reduce the quantity of frivolous prisoners' civil rights suits brought in federal courts. Judicial leaders have voiced repeatedly their concern over the growing volume of prisoner petitioners on the civil

dockets of federal courts. See, *e.g.*, W. Burger, *The Condition of the Judiciary: Year-end Reports,* January 3, 1976. The real focus for this justified concern, however, has not been prisoner petitions in general but rather those complaints related to daily living that consume an enormous amount of judicial time in sifting through numerous claims which, although often important to the petitioner, do not state a cause of action under 42 U.S.C. § 1983.

It is not enough for an administrative grievance mechanism simply to identify and dismiss "frivolous" grievances, *i.e.*, those that are questionably actionable under § 1983 or not actionable at all. An inmate whose complaint has been summarily *dismissed* by the administrative mechanism is then free immediately to petition a federal court for a hearing. For example, in the Maryland grievance system, where a substantial proportion of grievances are dismissed without resolution, there is nothing to prevent those complainants from submitting petitions to the nearest federal court, whether or not an exhaustion requirement exists.

It should be recognized that only an administrative mechanism that responds effectively to the minor complaints of inmates as well as to their major ones will reduce the volume of § 1983 petitions in federal courts. Accordingly, the Center reemphasizes that, to be effective, a grievance procedure in corrections must be objectively fair and be perceived as fair by inmates and submits that the standards discussed above are critical to the creation of fair administrative mechanisms.

III. THE MARYLAND INMATE GRIEVANCE COMMISSION PROCEDURE IS NEITHER ADEQUATE NOR TIMELY AND SHOULD NOT BE THE SUBJECT OF AN EXHAUSTION REQUIREMENT.

The Inmate Grievance Commission [hereinafter referred to as the "Commission"] is the key step in Maryland's three-stage grievance procedure. The Commission's five members are appointed by the Governor while the Executive Director of the Commission is appointed by, and serves at the pleasure of, the Secretary of Public Safety and Correctional Services [hereinafter referred to as the "Secretary"]. An inmate with a grievance must forward it first to the Executive Director, who may dismiss any complaint "wholly lacking in merit," Ann. Code of Md. Art. 41, § 204F(e). If accepted, a grievance is heard by the Commission, which subsequently publishes its findings and recommendations. Any grievance the Commission finds meritorious in whole or part is reviewed by the Secretary, who has 15 days to approve, disapprove, or modify the decision. A grievant may appeal the final decision of the Secretary to the nearest Maryland circuit court.

Any inmate grievance procedure, providing a remedy to men and women who are under the complete control of the state, must be examined with special care for safeguards that prevent subversion of the process. This is not an idle concern, as illustrated by the dissent of James V. Bennett, Maryland Grievance Commission member and former director of the Federal Bureau of Prisons, in the case of William Bryant [reproduced as Addendum D to the Brief of Respondents]. Commissioner Bennett's account of the cavalier treatment of a grievant's claim of denial of due process demonstrates the gap that may exist between the theoretical

structure of a grievance mechanism and its actual operations.

While at first glance a reasoned, orderly mechanism for settling inmate complaints, the Maryland procedure does not conform to many of the standards described above as essential to an adequate and timely grievance mechanism. Some of the flaws are due to the design of the system as currently structured in Ann. Code of Md. Art. 41, § 204F and reveal themselves in the recorded operations of the grievance procedure. When measured against these standards, *supra*, the weaknesses of the Maryland procedure can be identified readily:

(1) *Written responses with reasons.* A major failure of the Maryland procedure is the absence throughout of a *requirement* for written statements of the reasons for actions taken. When the Executive Director dismisses a case, he need not specify his reasons for dismissal. The Commission, while empowered to issue orders, is not required to explain its reasoning. This omission has led, at least occasionally, to a lack of deliberation about the merits of particular cases among the members. See, *e.g.*, the *Bryant* case, *supra*. The Secretary may affirm, reverse or modify the Commission's order; he is not required to give reasons for doing so.

(2) *Time Limits.* The Maryland grievance procedure is essentially an open-ended one: when a complainant submits a grievance, he does not, and can not, know how many days it will take to exhaust the procedure. He knows only that Commission hearings are to be held "as promptly as practical." Once a hearing has been held, there is no time limit within which the Commis-

sion must issue an order. Only at the final level of the procedure, the Secretary's response, is there a specific time limit, 15 days. The only other time limit in the procedure involves dismissals, which must be returned to the grievant within 60 days. Considering the importance of the timeliness standard for the creation of a fair and effective procedure, the Maryland procedure is seriously deficient.

The Commission is slow in practice as well as in theory. From June 1, 1972, to June 18, 1973, the Commission issued a total of 238 decisions. The median time between the filing of grievances and final orders was five months. In the 127 cases decided in the later period from November 19, 1973, to February 20, 1974, the median time between the filing and a decision had increased to six months or 24.8 weeks. This figure decreased to three months or 13.6 weeks in the period from October 17, 1974, to October 17, 1975. Brief of Petitioners, pp. 36-37.

Far more sobering than such general statistics are the facts of individual Maryland cases. For example, on September 25, 1972, one inmate filed a complaint about inadequate medical treatment for gunshot wounds suffered outside the prison. A hearing, held on November 29, 1972, was continued until December 13, 1972. While an interim order for a hospital examination was issued on December 4, 1972, a final order in the case was not issued until April 26, 1973. Brief of Defendant, Appendix p. 301a, *McCray* v. *Burrell*, 367 F. Supp. 1191 (D. Md. 1973). This grievance, involving a medical emergency, required seven months from submission to final order. For an inmate with a broken bone or a bleeding wound or an aggravating

illness, a system that provides answers and assistance seven months later is both inadequate and untimely.

(3) *Outside review.* The Maryland procedure initially seems to conform to this standard, but closer scrutiny reveals two serious flaws. The first is that the Commission itself does not perform the function of *review*. Rather, as petitioners admit, "the position of the Inmate Grievance Commission is similar to that of a trial court in which certain of its decisions are subject to mandatory review." Brief of Petitioners, p. 31. The review of Commission decisions is conducted, of course, by the Secretary of the corrections department.

A second flaw is that many non-litigable grievances are dismissed with no opportunity for outside review. The Executive Director makes virtually all administrative dismissals. Brief for Defendant, Appendix pp. 294a-295a, *McCray* v. *Burrell,* 367 F. Supp. 1191 (D. Md. 1973). These come after an investigation made by contacting "an institutional representative who has been assigned for these purposes" and who "also [is] the person who represents the institution's position to the Commission at the hearing." *Id.* pp. 302a-303a. Dismissals "constitute the final decision of the Secretary." Art. 41, § 204F(f)(1). This would be less crucial were the Executive Director an "outside" reviewer, but, unlike the Commissioners, he is appointed by and serves "at the pleasure of the Secretary." Art. 41, § 204F(b).

There is no way to challenge an administrative dismissal short of court review. That legitimate grievances sometimes are shunted aside is apparent from a single example; one inmate filed a complaint containing, among others, the following allegations:

> I'm denied 'No Censorship of Outgoing Mail' in accordance with Guajardo versus McAdams, 349 F. Supp. 211 (Southern District of Texas 1972) I am to mail my letters without censorship, which is being denied me.
>
> In accordance with Wright versus McMann, 460 E. [sic] 2nd 126 (2nd Cir. 1972) 'No punishment disproportionate to the offense (and therefore cruel and unusual).' I was put into a cell with no bed, blanket, sheet—just a sink and toilet and I had all clothes taken from me. Brief for Defendant, Appendix pp. 287a-294a, *McCray* v. *Burrell,* 367 F. Supp. 1191 (D. Md. 1973).

The Executive Director dismissed the complaint. Asked if the case had been investigated, he replied, "No, because I don't consider he ever filed a specific grievance." *Id.* p. 291a.

(4) *Hearings.* The hearings actually provided by the Maryland Commission are adequate. The system fails to meet the Center's suggested standard, however, by failing to provide hearings in over 50 percent of the grievances submitted. Research on its own grievance procedure conducted by the California Youth Authority indicates strongly that inmate satisfaction with a grievance procedure may be more closely associated with the opportunity to express one's grievance in a hearing than with the favorableness of the response. California Youth Authority Research Division, *Final Evaluation of Ward Grievance Procedure at Karl Holton School,* pp. 45-50 (1974).

The Maryland Inmate Grievance Commission excludes inmates and line staff from any significant participation in the Commission's operations. Once a grievant writes to the Executive Director, the latter

unilaterally decides whether a grievance is within the jurisdiction of the procedure or whether the grievance is "frivolous." If the Executive Director decides to attempt to resolve the grievant's complaint informally, the grievant is without recourse, even if he is dissatisfied with the result. Although the grievant whose complaint is scheduled for a hearing has an opportunity to present his case, no other inmate will have a share in the decision-making process. Nor will any staff member who might have some personal knowledge of the inmate, his living unit or the way in which policies are enforced on his living unit. Not surprisingly, the great majority of inmates interviewed by Center staff in different Maryland correctional institutions knew little about the Commission's purpose or mechanics and viewed the procedure simply as an obstacle designed to keep inmates out of court. Keating, *Seen*, at 82-85.

This lack of inmate confidence in the Commission is reinforced by the great unlikelihood that the system will provide a grievant with a favorable response. Available statistics indicate that in its first 31 months of operations, the Commission received 1385 complaints. Administrative dismissals accounted for 752 (54.3%) of submitted complaints; after a hearing before the Commission, only 152 grievances (11%) were found to be meritorious in whole or part. While dismissals can occur for a variety of reasons, including a decision by the inmate that his problem has been resolved satisfactorily, in a typical 90-day period for which such statistics are available, only four (6.3%) of the 63 dismissals were so resolved. During the same period, ten submitted complaints (15.8%) were withdrawn. Brief of Appellant, p. 75, *McCray* v. *Burrell*, 516 F.2d 357 (4th Cir. 1974).

It is important to compare this record with that of an administrative procedure which includes all of the standards suggested by the Center and, in addition, provides for considerable inmate participation. In its first 26 months of operations, the California Youth Authority (CYA) procedure received 3742 complaints.* There are no provisions in the CYA system for dismissals, but some grievances (15.1%) were withdrawn and some were resolved informally, (24.1%). Of all grievances submitted, 2588 (69.2%) were found to be meritorious in whole or in part.

The difference between the two mechanisms is apparent. The California Youth Authority procedure seems to focus on resolving the complaints of inmates promptly and fairly, while the Maryland Inmate Grievance procedure appears to place too much emphasis on establishing a reviewable court record in grievances that might be litigable. The result can be seen in responses to a 1974 questionnaire administered by the Center to a randomly selected ten percent of the inmate populations in Maryland and California institutions. When asked if their complaints were handled promptly, 71.4% of the questioned inmates in the Maryland institution answered, "no"; when asked if their complaints were handled fairly, 64.3% answered, "no." By contrast, only 20.7% of the inmates in one CYA institution answered, "no" to the question about prompt handling of complaints and 10.3% to the question about the system's fairness.

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* The incarcerated population served by the CYA procedure is approximately 4200 inmates; that of Maryland served by the Commission is approximately 5000.

The Center has contended that the standards discussed in this brief are essential for the creation of an effective and fair—and, therefore, adequate and timely—administrative remedy for inmates' grievances. Since the Maryland Inmate Grievance Commission machinery fails to meet those requirements in important respects, it should not be deemed to justify an exhaustion requirement in this case.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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